INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the United States the construction of which is involved	2
Dates of the decree and application for appeal	4
Nature of the case	4
Substantial nature of questions presented	5
Cases believed to sustain the jurisdiction	8
Appendix-Opinion of the District Court	9

Table of Cases Cited

B. & O. R. R. Co. v. *U. S.*, 304 U. S. 58	8
Beacon Fast Freight Co., Inc.—Purchase—Clarence L. Hardy, Docket No. MC-F 2405	4
Escanaba & Lake Superior R. R. Co. v. *U. S.*, 303 U. S. 315	8
Florida v. *U. S.*, 282 U. S. 194	8
Gregg Cartage & Storage Co. v. *U. S.*, 316 U. S. 74	6
Quaker City Bus Co.—Purchase—Blackhawk Line, Inc., 38 M. C. C. 603	5
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402	8
United States v. *Maher*, 307 U. S. 148	8
United States v. *Pan American Petroleum Corp.*, 304 U. S. 156	8

Statutes Cited

Act of August 9, 1935, c. 498, 49 Stat. 544; as amended Sept. 18, 1940, c. 722, Sec. 7, 54 Stat. 905, C. 722, Sec. 18, 54 Stat. 920	2
Section 5(2) (a) (1)	2
Section 203(a) (14)	2, 4
Section 212(a)	3, 6, 7

Page

Judicial Code, Section 238, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345) 2
Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219 (28 U. S. C. 45 and 47a) 2
United States Code, Title 28, Sec. 47 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 276

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

(Filed May 21, 1946)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the appellants respectfully submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is

conferred by Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C. Title 28, Sec. 345);

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. C., Title 28, Secs. 45 and 47a, Supp. III);

B. The statute of the United States the construction of which is involved herein, is the Act of August 9, 1935, c. 498, 49 Stat. 544; as amended Sept. 18, 1940, c. 722, sec. 7, 54 Stat. 905, C. 722, sec. 18, 54 Stat. 920, known as the Interstate Commerce Act, Part II, as amended, and provides for the regulation of interstate motor carriers by the Interstate Commerce Commission. The pertinent sections of the Act read as follows:—

Section 5 (2) (a) (i) "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 203 (a) (14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation,

whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transporation shall continue to be considered to be and shall be regulated as transportation subject to part I." (as amended by Public Acts No. 785, 76th Congress, sec. 18 (a), approved Sept. 18, 1940.)

Sec. 212 (a) "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit , or license: Provided, however, That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, that the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be

suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder." (as amended by Public Acts No. 785, 76th Congress, sec. 21 (c), approved Sept. 18, 1940.)

C. The decree sought to be reviewed was entered on March 29, 1946, and the petition for appeal was presented to the District Court on May 21, 1946.

D. This is an appeal from a final decree of a district court of three judges (28 U. S. C. A. sec. 47) which dismissed a complaint against the United States of America and Interstate Commerce Commission to set aside an order of the Commission dated November 1, 1944 in a proceeding entitled *Beacon Fast Freight Co., Inc.,—Purchase—Clarence L. Hardy, docket No. MC-F-2405,* wherein an application under Section 5(2)(a) of the Interstate Commerce Act, as amended, to purchase the operating rights of Clarence L. Hardy was granted by the Commission.

The Complaint, as filed in the district court, alleged in substance (1) that the vendor of a Certificate of Public Convenience and Necessity had wilfully abandoned his motor common carrier operations, sold his motor vehicle equipment, closed his terminal, and discharged all his employees, and, after a period of sixteen (16) months, negotiated a sale of his Certificate to the vendee; and (2) that, for the purpose of transacting a sale of this Certificate, the vendor was not a "carrier" within the meaning, purpose and policy of the Interstate Commerce Act, as amended, especially under Sections 5 (2) (a) and 203 (a) (14), as amended. Hence, the granting by the Commission of the application to purchase the operating rights of this vendor was unlawful as being beyond its statutory powers.

The Report of the Commission, by Division 4, on which the order was based, found that since the vendor had an outstanding unrevoked certificate issued by the Commission, its decision was controlled by the decision laid down, with strong dissent in *Quaker City Bus Co.—Purchase—Blackhawk Line, Inc.*, 38 M. C. C. 603, 607, namely,

> "Possession of a certificate, in and of itself, and without the performance of any transportation, constitutes the holder thereof, a 'motor carrier subject to Part II', and that a sale of the certificate presents a matter subject to the jurisdiction of the Commission under Section 5 (2) (a) of the Act, notwithstanding the abandonment of motor carrier operations."

Final hearing was held by the District Court of three judges, one of whom was a Circuit Judge. A transcript of all the evidence received before the Interstate Commerce Commission, duly certified by the Secretary of the Commission, was received in evidence before said Court. Thereafter, on March 29, 1946, the Court rendered its opinion upholding the order of the Interstate Commerce Commission and dismissed the complaint.

E. The questions presented are substantial and of great and recurring importance to the motor carrier industry and to the Interstate Commerce Commission in its action on the numerous applications to purchase operating rights under Section 5 (2) (a) of the Act. The Court's decision in this case is the first by any Court on the question and interpretation of the statutes involved in this appeal.

The record in this case shows that the vendee has admittedly attempted to extend its motor common carrier operations into the North Shore area of Boston, Massachusetts, where it had been denied claims of "grandfather" rights and where it had been subsequently denied permission to purchase the operating rights of another carrier operating within that territory. As a result of the decision

in this case, the vendee succeeds in extending its operations into the North Shore area and evading the normal standard of proof, not by showing that public convenience and necessity require the new service but by purchasing an outstanding Certificate of Public Convenience and Necessity which is without meaning or substance as naturally understood in the transportation industry for lack of a going-business status.

The transfer of this certificate is approved by the Commission and affirmed by the District Court on the ground that the language of Section 212 (a) of the Act more than counter-balances the inference to be drawn from the language of Section 5 (2) (a).

Other sections of the Act would seem to indicate that Congress contemplated the emphasis upon the actual carrier rather than the actual certificate. Section 215 provides that no certificate shall be issued or remain in force unless the carrier complies with the prescribed regulations for security protection of the public; Section 216 provides for safe and adequate service, just rates, through routes; Section 217 provides for filing and adherence to tariffs; Section 206(a) provides for reasonable continuous bona fide operation before and after the "grandfather" date of June 1, 1935 before the Commission was authorized to issue a Certificate of Public Convenience and Necessity. It seems clear, however, that Section 212(a) is simply a punitive measure to provide a procedure for compelling adherence to the provisions of the Act.

In *Gregg Cartage & Storage Co.* v. *United States, et al.*, (316 U. S. 74) the Supreme Court of the United States has stated, in discussing the value of operating rights which have become unused and thereafter sold, that since the purchaser of the operating rights "bought these rights in this state of voluntary suspended animation, and seeks to revive them, he cannot be heard to say that he takes the

rights free of any impairment by the voluntary suspension of operation of the then owner from whom he derives title." Yet, the Commission's rule is different once a Certificate of Public Convenience and Necessity has been issued to a motor common carrier. Its life span is determined only by Section 212(a) of the Act. The carrier retains a property right in it for personal use *or for sale* regardless of whether or not he performs any transportation service thereunder. Such an interpretation now sanctioned by the District Court is not only contrary to the common law concept of a Certificate of Public Convenience and Necessity but seems to violate the natural construction of other provisions of the Interstate Commerce Act.

While it seems that Congress intended Section 212(a) to protect a motor common carrier from an automatic nullification of his franchise for a lapse of operations, yet it does not seem that Congress intended to treat a Certificate of Public Convenience and Necessity as a speculative security, to be sold to the highest bidder, as if it were possessed of a value of its own, distinct from the values developed by the conduct of transportation operations under the certificate. If now the vendee is permitted by purchase of an outstanding unrevoked certificate to mingle the operating rights embodied therein with its own operating rights, irrespective of any going-business status of the vendor, then clearly the provisions of the Interstate Commerce Act are effectively contravened.

If the decision of the District Court is to stand, it will give rise to widespread and undesirable trafficking in Commission granted certificates, of which tens of thousands were acquired as a matter of right under the "grandfather" clause of the Act and are now outstanding in the possession of small carriers and individuals such as the vendor in this case. Upon any lapse of motor carrier operations the traffic immediately is moved by its competi-

tors. If he re-institutes his service, there is always a serious readjustment to be made in the territory. But if, after a substantial lapse, a financially strong vendee of an outstanding unrevoked certificate is allowed to enter the field simply by purchase, it is clearly instituting a new motor carrier operation under a standard different from the statutory requirements of the Act, more leniently, and contrary to the purposes and policy of the Interstate Commerce Act.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *Maher*, 307 U. S. 148;
United States v. *Pan American Petroleum Corp.*, 304 U. S. 156;
Florida v. *United States*, 282 U. S. 194;
B. & O. RR. Co., et al. v. *United States*, 304 U. S. 58;
Escanaba & Lake Superior RR. Co. v. United States, 303 U. S. 315; and
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

G. A copy of the opinion of the District Court which includes its findings of fact and conclusions of law and a copy of the decree of said Court sought to be reviewed is appended hereto.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal.

Dated May 21, 1946.

Respectfully submitted,

JAMES JULIAN WEINSTEIN,
MICHAEL CARCHIA,
FRANCIS E. BARRETT,
Counsel for Appellants.

APPENDIX

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS

Civil Action No. 3683

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO., and LOWELL TRUCKING CORPORATION, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Woodbury, Circuit Judge, Sweeney and Healey, District Judges

Opinion of the Court

March 29, 1946

WOODBURY, Circuit Judge:

This is a suit brought under Sec. 24 of the Judicial Code, (28 U. S. C. Sec. 41, (28)) to enjoin, set aside and annul an order of the Interstate Commerce Commission approving the purchase of the operating rights of Clarence L. Hardy of Boston, Mass., by Beacon Fast Freight Co. Inc., of New York, N. Y. The standing of the plaintiffs to sue under the rule of *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 19, is conceded. The jurisdiction of this court in the premises is unquestioned and unquestionable.

The facts necessary for a decision of the issues presented are not in dispute and may be found as follows:

Beacon Fast Freight Company, Inc. is a common carrier by motor vehicle of general commodities, with the usual exceptions, operating over a regular route between Cambridge, Mass., and Jersey City, N. J. under a certificate of convenience and necessity issued to it under the "grandfather" clause on October 15, 1943. It serves Boston and New York as intermediate points.

Clarence L. Hardy, on May 1, 1941, was issued a certificate, also under the "grandfather" clause, authorizing him to operate in interstate or foreign commerce as a common carrier by motor vehicle of general commodities, with the usual exceptions, over irregular routes between Boston on the one hand and all points and places in Massachusetts on the other. His principal business in former years consisted in the transportation of property in truck load lots from the docks in Boston to various interior Massachusetts points. He seldom was offered return loads to Boston and he had no interchange arrangements with other carriers. After the outbreak of the European war the movement of import traffic largely ceased and when this country entered the war ocean borne traffic from the Pacific coast also ceased. However, Hardy continued some operations until the Office of Defense Transportation issued a general order on July 13, 1942 relating, among other things, to the performance of transportation service by motor truck solely in one way loadings, and then, finding it difficult to comply with that order, he ceased all operations. This occurred on or about August 15, 1942. From that date until about December 15, Hardy leased his equipment to a private contractor, but he continued to pay rental on a terminal at Malden, Mass. until March 1943, by which time he had sold all his motor vehicles. In May 1943, he applied to the Commission for authority to suspend operations for the duration of the war, but his request was denied. As of the date of the Commission's hearing, February 7, 1944, he had cargo and liability insurance in effect, and tariffs on file with the Commission. Since June 1943 he has been employed by the United States Government.

On January 31, 1944, Beacon and Hardy entered into an agreement for the sale of the latter's operating rights to the former for $1800 payable upon approval of the transaction by the Commission.[1] Thereupon Beacon and Hardy filed a joint application with the Commission for such approval under Sec. 5 (2) (a) (i) of Part I of the Inter-

[1] Beacon's object in making this purchase is to obtain access to the area northeast of Boston known as the North Shore.

state Commerce Act, (49 U. S. C. Sec. 5, (2) (a) (i)) and in the proceedings before the Commission on that application the present plaintiffs appeared as party protestants. They confined themselves, however, to the cross-examination of witnesses and to argument. Before it their contentions, as found by the Commission were: "(1) that vendor wilfully abandoned his operations and that therefore his certificate is voidable and not the fit subject of sale under section 5; and (2) that, in any event, it would not be consistent with the public interest to authorize purchase by vendee, a regular-route operator, of irregular-route operating rights which clearly were not used by vendor in the performance of a through service in the manner proposed by the vendee."

The Commission, however, on November 1, 1944, ruling in accordance with its decision in *Quaker City Bus Co.-Purchase-Blackhawk Line, Inc.*, 38 M. C. C. 603, 606, that "Possession of a certificate, in and of itself, and without performance of any transportation, constitutes the holder thereof 'a motor carrier subject to Part II' " and finding that the proposed purchase would be consistent with the public interest and would not "materially affect the present competitive situation or injure protestants in such a way as to threaten continuance of their operations or impair their ability to perform their common carrier obligations to the shipping public," approved the purchase subject to usual conditions.

Thereupon the protestants as plaintiffs brought the instant suit in which they make three points. They say (1) that the Commission had no jurisdiction under Sec. 5 (2) (a) (i) to approve Beacon's application to purchase Hardy's certificate of public convenience and necessity for the reason that the latter had voluntarily ceased all operations under his certificate and therefore was no longer a "carrier" within the meaning of Part II of the Act; (2) that the Commission erred in approving the application for the reason that Hardy did not possess any "transferable right" to operate in interstate commerce because his operations brought him within the second proviso of Sec.

206 (a) of the Act (49 U. S. C. Sec. 306 (a));[2] and (3) that the proposed transaction of purchase and sale, if consummated, would be inconsistent with the public interest.

Only the plaintiffs' first point merits extended consideration.

Their second point was not made before the Commission but is made for the first time here. Therefore, upon the authority of *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779, 780, we rule that it is not properly before us for consideration. To be sure the plaintiffs here, when appearing as protestants before the Commission, did not expressly waive the point they now make, and in this respect the case at bar differs from the *Hancock* case. Nevertheless the reasoning of that case is applicable, and furthermore, although strictly speaking we are not an appellate court, we in reality are called upon to exercise appellate functions, and from this we think it follows that we should apply general principles applicable on review.

Their third point raises a question for determination by the Commission in the exercise of its expert administrative discretion. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87, 88 and cases cited.

Since it does not appear that the Commission overstepped any limit expressly placed by Congress upon its discretion, and since its conclusion has ample support in the evidence—in fact the plaintiffs' argument on this point, upon analysis, is only that the Commission erroneously weighed conflicting evidence—we see nothing to warrant further consideration of this point.

---

[2] "*And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter." It appears that there is such a board in Massachusetts and that Hardy had obtained an appropriate certificate from it.

The plaintiffs' argument in support of their first point runs as follows: They say that Sec. 5 (2) (a) (i) *supra* makes it lawful "for any carrier . . . to purchase, . . . the properties, or any part thereof, of another" only "with the approval and authorization of the Commission;" that Sec. 5 (13) of the Act defines the term "carrier" as used in Sec. 5 paragraphs (2) to (12), inclusive, to include "a motor carrier subject to chapter 8 of this title" (chapter 8 is Part II of the Interstate Commerce Act) and that in Part II Sec. 203 (a) (14) (49 U. S. C. Sec. 303 (a) (14)) the term "common carrier by motor vehicle" is defined to mean "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce . . . of . . . property . . . for compensation." Then they say that to be a "carrier" within Sec. 5 (2) (a) (i), that is, one whose transactions of purchase of another carrier's property to be legal must be approved by the Commission, one must be actually conducting operations of carriage, since otherwise there is no holding out to the public to engage in transportation, and so by definition the Commission's jurisdiction fails.

This argument has logic so far as it goes, but other statutory provisions prevent its adoption.

The so-called "grandfather" clause of Sec. 206 (a) of the Motor Carrier Act (49 U. S. C. Sec. 306 (a)) requires that there shall be continuity of operation following the critical date of June 1, 1935, to entitle a carrier as a matter of right to a certificate of public convenience and necessity, (see *Gregg Cartage Co.* v. *United States*, 316 U. S. 74) but this section is not to be confused with the one under consideration here. It has no bearing on the life span of such a certificate once it has been issued. That matter is covered by Sec. 212 (a) of Part II of the Act (49 U. S. C. Sec. 312 (a)) which provides that certificates from their effective date "shall remain in effect until suspended or terminated as herein provided," and that termination, except upon application of the holder, must be by the Commission, either upon complaint or on its own initiative, after notice and hearing. This explicit provision seems to us to more

than counter-balance the inferences drawn by the plaintiffs from the definitions used in the Act, and fully to warrant the Commission's interpretation of the Act in *Quaker City Bus Co.-Purchase-Blackhawk Line, Inc.*, 38 M. C. C. 603, in which it said (p. 606): "The mere fact of an interruption in operations does not automatically revoke a certificate. To accomplish a revocation of a certificate the provisions of section 212 (a) must be satisfied." "Until that certificate is revoked in accordance with the procedure prescribed in Sec. 212 (a), it remains in full force and effect." "Possession of a certificate, in and of itself, and without performance of any transportation, constitutes the holder thereof 'a motor carrier subject to Part II.'" See also *Smith Bros. John C. Sandidge Receiver*, 33 M. C. C. 465, a proceeding for the revocation of a certificate, in which the Commission (p. 473) said "That the complete cessation of operations by respondents did not automatically and without further proceedings on our part cause a termination of their certificate . . ."

We concede that cessation of service by a carrier may, under appropriate circumstances, warrant revocation of a certificate by the Commission. And it may be that what Hardy did, or failed to do, was enough to warrant such action by the Commission. However, no complaint, so far as appears, was ever made to the Commission and it took no action on its own initiative, so that question is not before us. For present purposes it is enough that no action was ever taken by the Commission to revoke Hardy's certificate.

The provisions of Sec. 212(a) so clearly indicate that it was the intent of Congress that once a certificate of public convenience and necessity issued it should not be revoked, except possibly by actual abandonment, without action by the Commission after notice and hearing, that it would serve no useful purpose to consider the plaintiffs' arguments separately and in detail, or to labor the point further.

The plaintiffs' complaint is dismissed.

CLERK'S CERTIFICATE

IN

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. Motor Transportation Co., and Lowell Trucking Corporation, *Plaintiffs,*

VS.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Defendants*

I, James S. Allen, Clerk of the District Court of the United States of America for the District of Massachusetts, do hereby certify that the foregoing constitutes a part of the transcript of the record on appeal in the above entitled matter.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this second day of July, A. D. 1946.

[SEAL]

JAMES S. ALLEN,
Clerk.